BOARD OF ALIEN LABOR CERTIFICATION APPEALS
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'

DATE: February 24. 1997

CASE NO: 95-INA-264

In the Matter of:

RCG INFORMATION TECHNOLOGY, INC.,
Employer,

On Behalf of:

ROMEO REGALA YEE,
Alien

Appearance: R. B. Solomon, Esq.
New York, New York, for the Employer and the Alien

Before: Huddleston, Holmes, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of the Alien Romeo Regala Yee (Alien) filed by RCG Information Technology (Employer), pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at Dallas denied this application, the Employer requested review pursuant to 20 CFR § 656.26. The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

Statutory authority. An alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient U. S. workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and

(2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. See 8 U.S.C. § 1182(a)(5)(A). An employer desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

Procedural history. On October 11, 1995, the Employer filed an application for labor certification to enable the Alien, a Philippines national, to fill the job of "Systems Programmer." AF 117-118, 121-122. Employer's application describes the work of that position as follows:

> Responsible for planning, installing, maintaining and supporting network software for AIX and UNIX based communications systems.

The job described in this application is Programmer/Analyst under Occupational Code 030.162-014 of the Dictionary of Occupational Titles, Employment and Training Administration, U. S. Department of Labor, based on the CO's analysis.[1] AF 117. Employer required a baccalaureate degree with a major in either computer science, mathematics, engineering, or business administration. Employer specially required that the two years of experience encompass work in systems programming support, including the installation of network software for AIX and UNIX systems. AF 117.

Report of Recruitment Results. Employer's effort to recruit workers for this position resulted in referrals and applications for Chetan V. Ramanna, Harsha Lakshmikantha, Nageshwar Aita, Deborah Kaye Horton and John E. Brown. AF 67-68. Stating it had contacted all candidates, the Employer reported that it rejected all of the applicants for various reasons. AF 50-51. First, the Employer reported that when it reached applicants Lakshimikantha, Ramanna, and Aita by telephone it discovered that each of them was in the United States on a non-immigrant visa and their employment in this position would require Employer's sponsorship.

Unaffected by any such question of status, Mr. Brown and Ms. Horton each offered a resume indicating a Bachelor of Science

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[1]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

degree with a major in computer science and at least two years of practical experience that included UNIX based systems. Employer said that it did not reach Mr. Brown, claiming that he had not supplied an address or telephone number. As his name and address were clearly stated at the top of his resume, Employer's representation is inconsistent with the evidence of record and is not credible. AF 54-55. Also, the Employer asserted that it telephoned Ms Horton, interviewed her at its office, and rejected her on grounds that she had no experience in AIX. When the Alien Labor Certification Unit of the Texas State Employment Commission contacted Ms Horton to verify referral of her resume, however, Ms Horton denied that the Employer either contacted or interviewed her for this job. AF 46-48, 54-55, 62-66.

The Employer based its rejection of the two U. S. workers on the grounds that they were not qualified in that they did not assert two years in planning, installing, maintaining, and supporting network software for AIX based systems. The Employer emphasized that general Systems Programming background was not satisfactory for the purposes of this position. It said that,

> UNIX is an all purpose operating system, developed originally by AT&T, designed to work in all computer hardware environments; and AIX is a UNIX-type system, developed by IBM, to work on all of its various sized computers.

AF 80-81.

Notice of Finding. The September 29, 1994, Notice of Finding (NOF) advised the Employer that, subject to Employer's rebuttal, certification would be denied under the subsections of 20 CFR §§ 656.21(b)(2) and (5), with specific reference to § 656.21(b)(2)(i) at §§ 656.21(b)(2)(i)(A) and (B), and to § 656.21(b)(2)(iv). Under § 656.21(b)(2) the NOF required Employer to demonstrate that its job requirements either were not unduly restrictive or that they arose from business necessity.[2] In this regard, the Employer was directed to show that its special requirements were those normally required for this job in the United States and were those defined for the job in the Dictionary of Occupational Titles, including those for job subclasses. Under § 656.21(b)(5) the NOF required Employer to prove that the criteria stated in the application represent its actual minimum requirements for the position. To establish this fact Employer was directed to show that it had not hired workers with less training or experience for jobs similar to the position involved in this application or that it is not feasible to hire workers with less training or experience than the Employer's job offer required.

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[2]For a history of the Act and regulations and for background on "business necessity" see **Information Industries, Inc.**, 88-INA-82(Feb. 9, 1989).

(1) The CO found that Employer's requirements for specific knowledge and experience in Item 15 of Form ETA 750, Part A, were not normally required for such work in the United States and were unduly restrictive for this reason. The NOF then said this finding could be rebutted by the Employer's evidence that its special requirements arose from business necessity under 20 CFR § 656.21(b)(2)(i), based on proof that such criteria bear a reasonable relationship to the occupation in the context of the Employer's business and are necessary to perform the job in a reasonable manner. The CO then noted the special requirement that an applicant's experience must encompass systems programming support that includes two years of experience in installing network software for both AIX and UNIX systems. The NOF said the application did not provide documentary evidence supporting the business necessity for such requirements, noting also that the acronyms and abbreviations used were unknown, the CO made particular reference to "AIX" in explaining that,

> A letter dated October 11, 1993, states that "AIX is a UNIX-type system, developed by IBM, to work on all of its various sized computers." The Employer has not presented documentation which explains the specific uses and applications of this program. To document the availability of this specific computer program the employer must present the manufacturer's specifications of the program which explain the application(s) of the program and documentation which establishes the range of distribution of the UNIX system among businesses in the United States.
>
> The employer must also provide documentation which establishes that the AIX experience is a normal requirement for the occupation in the area of intended employment. This documentation should include, but is not limited to, position descriptions of the same or similar jobs within the employer's organization which hold the same job requirements as those required in this application.

While specific knowledge and experience required by the Employer may prove advantageous, the absence of such knowledge does not appear to preclude the worker from performing the basic duties of this job, the CO observed, adding, "It appears that the requirements are a preference, not a business necessity, and as such are unduly restrictive and preclude referral of otherwise qualified U. S. workers." In noting that the special requirement must arise from Employer's business necessity, the CO said its hiring criteria for this position may not be based on employer and/or customer preference or convenience. For these reasons, concluded the CO, unless the Employer shows that such special requirements arise from business necessity, under 20 CFR § 656.2(b)(2) the qualifications must be those normally required for this position as it is described in the Dictionary of Occupational Titles. AF 39-40.

(2) The CO also found that the Employer had not provided documentation supporting its reasons for rejecting the job applications of Chetan V. Ramanna, Harsha Lakshmikantha, Nageshwar Aita, Deborah Kaye Horton and John E. Brown. In addition, it was directed to clarify the inconsistency between its own report of recruitment results and Ms Horton's report in the followup questionnaire that the Employer did not contact or interview her.

Rebuttal. The employer's rebuttal presented an affidavit by its vice president, who said it is a data processing consulting company in the business of hiring and placing its employees as computer consultants in functions that fulfill its clients' requirements for various system projections to meet individual data processing needs. It customarily hires programmer/analysts, system analysts, software engineers, and system programmers for this purpose. The Employer pays the salary of the employee it assigns as a consultant, and it then bills its customer according to the fee arrangement between them. For this reason the Employer seeks "multiple skill sets" in the personnel it hires, including software, data bases, and hardware. The reason is that the flexibility of its employees permits it to move them among customers to fulfill a variety of needs while minimizing its need to recruit for various contracts. AF 30-31.

In addition, the employer submitted a copy of a letter by Ms Horton with a handwritten note suggesting that the Employer was in contact with her by way of contradicting her denial of this fact. AF 29. Employer's rebuttal also included copies of four forms prepared by its sales representative to describe the needs of three customers, which specifically noted their need for AIX software design, testing, and systems development services. AF 20-23, 31-35.

The Employer did not document the availability of AIX with manufacturer's specifications explaining its application, nor did Employer document the range of distribution of the AIX among businesses in the United States or in the area where the Employer does business. Instead, Employer filed a brief by its attorney who argued (1) that the job requirements in this application are the actual minimum requirements to perform the duties of the position offered, and (2) that it rejected the U. S. workers for lawful job-related reasons. Employer did not offer documentation to explain AIX and UNIX as acronyms and abbreviations with which the CO was unfamiliar, but it criticized the CO's request for enlightenment in the NOF. While repeating substantially the contents of Employer's letter of October 11, 1993, Employer noted several features of UNIX, asserting without documentation the broad usage of UNIX throughout the United States as an operating system which, he said, is a collection of programs to handle the input and output of data. Asserting that UNIX is used primarily in personal computers and also is used in mid-size and mainframe

instruments, Employer's brief said, "Different computer hardware manufacturers have adapted UNIX to their own equipment and consequently there are many versions of UNIX available, including AIX and XENIX for IBM machines."

Employer's brief argued that the CO erred in concluding that the absence of specific knowledge of AIX as a version of UNIX does not preclude the worker from performing the basic duties of this job. Adding his own comments to the affidavit at AF 30-31, its counsel discussed Employer's "data processing consultancy" business in terms that invoke comparison of its function to a employment agency that hires workers for assignments of limited duration and enters into contracts to recruit, pay and assign such temporary workers for various jobs.[3] See AF 117.

Since Employer's business is to provide temporary help for firms operating computer equipment that uses a variety of data processing systems, its brief argues that the Employer's business necessity is the business necessity of its customers. In this case, continued counsel, the Employer is recruiting an employee with needed skills with AIX version of the UNIX operating system for a period equal to the length of a contract to supply needed services for a customer using an IBM computer, as indicated by the job orders Employer filed in rebuttal. AF 32-35. Employer argued that based on this evidence,

> Business reality demands that only a 'UNIX/AIX' Systems programmer can fill a UNIX/AIX opening. Business reality has no place for a 'generic Systems Programmer' when a skill specific Systems Programmer is required.

Such general statements in the Employer's brief and in the affidavit at AF 18-19 ignored the content of the job orders in AF 21 and 22 in which its sales representative specified "UNIX **or** AIX internal," while AF 20 and 23 only noted a need for AIX.[4]

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[3]Employer operates a business similar to the enterprise BALCA considered in **Personnel Sciences, Inc.**, 90-INA-43(Dec. 12, 1990). "Business reality" calls to our attention the existence of agencies supplying temporary help which hire a variety of workers whose capabilities range from unskilled and semi-skilled labor to a class of better trained individuals, whom this Employer calls "consultants" and assigns to customers needing temporary staff to perform such technical jobs as the systems programmer position described in its application. Based on these facts, this record suggests a further issue as to whether or not Employer's application describes an existing bona fide job opportunity. **Amger Corporation**, 87-INA-545(Oct. 15, 1987)(en banc), citing **Pasadena Typewriter and Adding Machine Co., v. Department of Labor**, No. CV-83-5516-AAH(T) Slip Op., C.D. Cal., Mar. 26, 1984). As the CO did not raise or determine that issue in the NOF or Final Determination, no such issue has been considered in this appeal, however.

[4]Emphasis added to the quotation for these exhibits.

This usage by Employer's sales staff suggests that the deponent and Employer's brief have overstated the evidence in providing Employer's version of business reality, that at least some of the Employer's sales representatives and customers referred to UNIX and AIX interchangeably, and that subject to specific exceptions the skills of the job applicants in UNIX were adequate to serve Employer's AIX customers, regardless of contrary representations in Employer's rebuttal brief.

Finally, in contending that it rejected the U. S. workers for lawful job-related reasons the Employer's counsel pointedly criticized the CO's request for proof to support the Employer's allegations that Ms. Horton was interviewed. To the extent that counsel's assertions are not supported by the evidence of record, they do not constitute evidence, however. **Personnel Sciences, Inc.**, 90-INA-43(Dec 12, 1990). The brief then said it relied on the notes of an unidentified staff recruiter who may have spoken to Ms Horton by telephone. On examination it is observed that these notes implied that an interview took place but failed to disclose any verifiable details of the episode. Because this record is as cryptic as it is laconic, it lacks credibility and no inference can be drawn from the evidence that will support counsel's assertions and explanations. AF 26.

Final Determination. On November 30, 1994, the CO's Final Determination concluded that Employer did not meet the criteria of 20 CFR Part 656, and the CO denied certification under the Act and regulations. AF 08.

1. Citing the regulation subsections identified in the NOF, the CO said Employer failed to document the business necessity of its special requirements for the reasons that follow. Although the NOF instructed the Employer to present the manufacturer's specifications for the UNIX and AIX programs that the Employer required in order to explain their application and establish the range of their distribution, it did not comply. Moreover, the Employer failed to establish the availability of AIX in the United States as part of the proof of its business necessity. As a result, the CO concluded that the Employer failed to prove the business necessity of its special requirement of proficiency in AIX. AF 09.

2. As U. S. workers applied for the job, the CO's noted that the NOF had required Employer to document its contact with Ms. Horton because since the file contained conflicting information as to whether any such interview actually took place. The NOF specifically directed Employer to reach Ms. Horton by certified mail and to present information to clarify this conflict. The CO concluded that the Employer failed to provide such documentation and that for this reason it had failed to document that U. S.

workers were rejected solely for lawful, job-related reasons. AF 10.

Employer's brief on appeal asserted that it had offered "alternative documentation" to demonstrate the availability of AIX which, it acknowledged, the CO had rejected as insufficient. Employer then incorporated in its brief a discussion of AIX as an extension of UNIX which was no more specific than its response to the NOF. While the textbook excerpts that the Employer claimed it transmitted to the CO with its brief were not included in this record, they were not admissible after the Final Determination as part of this appeal and have not been considered for this reason. As the Board explained in **Church Avenue Merchants Block Association**, 93-INA-281(Oct. 27, 1994),[5]

> The Board of Alien Labor Certification Appeals sits as an appellate body. Where, as here, the CO has clearly presented an employer with an opportunity to cure a deficiency at the rebuttal stage, such employer must seize the opportunity to do so, and not wait until after the final determination to seek to cure the deficiency. **Richard Clarke Associates**, 90-INA-80(May 13, 1992)(en banc); **Elliot & Frada Paskik**, 93-INA-38(Mar. 21, 1994); **Arch Construction & Consulting Co., Inc.**, 92-INA-419(Oct. 18, 1993).

Moreover, the unsupported assertions by Employer's counsel in this brief and in other parts of this record are not evidence of facts that can be considered in determining this appeal. **Personnel Sciences, Inc.**, 90-INA-43(Dec. 12, 1990).

Business necessity. The Employer challenged the CO's finding that the job requirements shall be those normally required for the job in the United States and defined for the job in the Dictionary of Occupational Titles under 20 CFR §§ 656.21(b)(2)(i)(A) and (B), based on the business necessity of experience in both UNIX and AIX for this position. The CO concluded that the Employer failed to establish two years' experience in AIX as a normal requirement for the occupation of systems programmer in the area of intended employment. In spite of the CO's explicit instructions in the NOF the CO found (1) that Employer had failed to file position descriptions of the same or similar jobs within its organization that have the same job requirements as the special requirements in this application and (2) that Employer failed to present documentation explaining the specific uses and applications of the AIX program.

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[5] Also see **Meriko Tamaki Wong,** 90-INA-407(Jan. 27, 1992); **Royal Antique Rugs, Inc.**, 90-INA-529(Oct. 30, 1991).

The CO said that while the specific knowledge and experience listed in the application may prove advantageous to the Employer for the reasons stated in the affidavit and in its briefs, the absence of such experience did not prevent workers from performing the basic job duties of a systems programmer. Consequently, the CO said Employer's special requirements are a preference and that it failed to establish that they were a business necessity. For these reasons the CO found Employer's special requirement for two years' experience in AIX were unduly restrictive and precluded the referral of otherwise qualified U. S. workers on grounds that the criteria exceeded the qualifications normally required for this job in the United States and for comparable jobs described in the Dictionary of Occupations Titles.

Rejection of U. S. workers. As Employer failed to document the fact that it had contacted and interviewed Ms. Horton, as required by the NOF, the CO further concluded that the Employer did not sustain its burden of proving that U. S. workers were rejected solely for lawful, job-related reasons.

Discussion. Because the evidence Employer submitted with its brief on appeal is late and the regulations make no provision to receive such a response after the Final Determination is issued, it cannot be considered for the reasons discussed above. **Church Avenue Merchants Block Association**, supra.

We agree with the CO's findings for the reasons stated in the NOF and Final Determination: (1) the Employer did not sustain its burden of proving that two years of experience in AIX is a business necessity and (2) the Employer did not sustain its burden of proving that Ms. Horton would be unable to perform the work of a systems programmer in the normally accepted manner that the job customarily is performed by a U. S. worker.[6]

As the Employer did not sustain its burden of proof in rebutting the CO's reasons for denying certification in the NOF, as further explained in the Final Determination, the following order will enter.

ORDER

[6]Note the Court's reasoning in **Pesikoff v. Secretary of Labor**, 501 F2d 757, 762 (D.C. Cir., 1974), cert den, 419 U.S. 1038 (1974).

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: **RCG INFORMATION TECHNOLOGY, INC., Employer**
ROMEO REGALA YEE, Alien

No: 95-INA-264

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: January 24, 1997.